PP

v.

ARAB MALAYSIAN FINANCE BHD

HIGH COURT MALAYA, ALOR STAR
ZAINAL ADZAM GHANI JC
[CRIMINAL NO: 43-07-2002]
19 AUGUST 2003

CRIMINAL PROCEDURE: *Revision - Order of sessions court judge under s. 32(2) of Dangerous Drugs (Forfeiture of Property) Act 1988 - Sessions court judge struck off respondent's application before reinstating it prior to making order - Whether decision to strike off application final by virtue of s. 278 of Criminal Procedure Code - Whether sessions court had jurisdiction to reinstate application - Whether wrong for sessions court to strike off application - Whether order to be set aside*

This was an application by the deputy public prosecutor ('DPP') for revision of the decision of the sessions court in respect of a reference by the public prosecutor under s. 32(2) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') in regard to the respondent's application ('the application') claiming that they were lawfully entitled to a motor vehicle seized under the Act. The sessions court judge, on 6 January 2002, struck off the application due to the respondent's absence but subsequently reinstated it, and after numerous adjournments, proceeded, on 28 May 2002, to make and record a consent judgment for the release of the motor vehicle to the respondent on condition that the respondent pay the government a sum of RM1,500 as compensation for the release.

The DPP, however, raised an objection, stressing that by virtue of s. 278 of the Criminal Procedure Code ('the Code'), the sessions court's decision to strike off the application was final and it had no further jurisdiction to reinstate the application since it was a criminal, not a civil, case. The DPP also argued that it was wrong for the sessions court to strike off the application due to the absence of the respondent as it was duty-bound to hear the application and make the appropriate decision. The issues that required resolving were whether: (1) the decision of the sessions court on 6 January 2002 fell within the definition of "judgment" in s. 278 of the Code; (2) civil procedure was applicable to an application or matter that was criminal in nature; and (3) the application before the sessions court was a criminal or civil proceeding.

Held:

[1] The definition of "judgment" as applicable to the Code is well established and the important element common in all the authorities available is that the order in question must be a final order in the sense that it is final in its effect and whether the judgment or order finally disposes of the rights of the parties. In this instance, the order of the sessions court striking out the respondent's application clearly did not have that element enabling it to be construed as a "judgment" within the provisions of the Code. (p 254 d-e)

[2] The Supreme Court in *Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hongkong* decided that the Rules of the High Court 1980 was validly and properly enacted in relation to both civil and criminal proceedings as it was enacted as subsidiary legislation of its parent Act, the Courts of Judicature Act 1964, which in s. 3, clearly includes "criminal proceedings" in its definition of "proceedings". Applying the same reasoning would make the Subordinate Courts Rules 1980 applicable to criminal proceedings in the subordinate courts because its parent Act, the Subordinate Courts Rules Act 1955, provides essentially the same definition of "proceedings" in its s. 2. Therefore, the sessions court had acted properly within its authority when it struck off the respondent's application and then reinstated it, even assuming that the application before it in this matter was a criminal application. (p 255 b-d)

[3] In deciding whether the application before the sessions court was a criminal or civil proceeding, the principles determining whether an order is said to be made in a criminal case and not in a civil case are: (i) the order must be a final order; (ii) it must involve the consideration of a crime or an offence against public law; and (iii) there must be a charge preferred before some court or judicial tribunal having or claiming to impose punishment for the offence. The respondent's application under s. 32(2) of the Act obviously did not have any of the three aforesaid elements; hence, the sessions court's orders in striking off and subsequently reinstating the application were made within its jurisdiction and authority. (p 256 f-h)

[4] In regard to the DPP's argument that it was wrong for the sessions court judge to strike off the application, it was not part of the DPP's complaint that the order releasing the motor vehicle by the sessions court, which was the whole substance and purpose of the application under s. 32(3) of the Act, was wrong or improper. If the DPP considered that the final order was proper in substance, then, by virtue of s. 34 of the Act, all the hassle of this revision would therefore be trivial and would not merit any consideration by this court. After all, the purpose for which the DPP referred the respondent's application was achieved and determined by the sessions court by the time this reference was applied for. (p 257 f-h)

[5] There is no provision in the Act for any compensation to be paid to the government or any other party when the court orders the release of property under s. 32(2) of the Act and there was, on the facts, insufficient "proof" as required under s. 32(2) for the satisfaction of the court. The respondent should at least be required to file an affidavit deposing on the relevant matters necessary to satisfy the court that it is lawfully entitled to the motor vehicle. (p 248 f & 249 a, c)

[5a] In conclusion, the application by the DPP was refused; however, the sessions court's order on 28 May 2002 was set aside, and the matter was to be remitted back to the sessions court to be reheard on an urgent basis with the respondent and DPP, if necessary, filing the requisite affidavits in support to enable the sessions court to make a proper order in due course. The sum of RM1,500 was to be returned to the respondent as there was no basis in law for the sessions court to have made such an order. (p 259 c-d)

[Ordered accordingly.]

Case(s) referred to:

Amand v. Home Secretary & Anor [1943] AC 147 ***(foll)***

Ang Gin Lee v. PP [1991] 1 CLJ 13 ***(foll)***

Dato' Mohamed Hashim Shamsuddin v. Atorney-General, Hongkong [1986] 2 MLJ 112 ***(foll)***

Datuk Harun Hj Idris v. Officer-In-Charge, Pudu Prison [1981] 2 MLJ 72 ***(dist)***

Gapari Kitingan v. Attorney General Malaysia [1991] 1 CLJ 247; [1991] 1 CLJ (Rep) 129 HC ***(refd)***

Kanagasavey Sinayah v. PP [1995] 2 MLJ 238 HC ***(dist)***

Kunn Rekon Holdings Sdn Bhd v. PP [1996] 2 CLJ 689 HC ***(refd)***

Marzuki Mokhtar v. PP [1981] 2 MLJ 155 HC ***(refd)***

Md Alwin Mustapa & Ors v. PP [1999] 5 CLJ 417 HC ***(refd)***
Mohd Dalhar Redzwan v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 4 CLJ 47 SC ***(refd)***
PP v. Raymond Chia Kim Chwee & Anor v. PP [1985] 2 MLJ 436 ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA ***(refd)***
Tan Kheng Teong & Anor v. PP [1992] 2 CLJ 1273; [1992] 3 CLJ (Rep) 672 HC ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Criminal Procedure Code, ss. 278, 307(1)
Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 31, 32(1)(c), (2)
Subordinate Courts Rules 1980, O. 14 r. 21, O. 28 r. 5

Criminal Procedure Code [Brunei], s. 240

For the applicant - Zabidah Ahmad DPP
For the respondent - Burhanudeen Abdul Wahid; M/s Burhan & Clemons

Reported by Suresh Nathan

JUDGMENT

Zainal Adzam Ghani JC:

This is an application by the deputy public prosecutor ("DPP") to revise the decision of the Session Court in respect of a reference by the Public Prosecutor under s. 32(2) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ("the Act"). The circumstances leading to this application need to be set out in some detail to enable it to be fully appreciated. They are as follows:

On 11 April 2001 Chief Inspector Ismail b. Daud from Jabatan Narkotik, Ibu Pejabat Polis Kontingen, Kedah arrested one Chong Chee Wah suspected to be involved with trafficking of dangerous drugs. Following that arrest, on 22 April 2001 Chief Inspector Mohd. Rosni b. Mohd. Lazim from Bahagian Perlucuthakan Harta, Jabatan Narkotik, Ibu Pejabat Polis Kontingen, Kedah seized a motor vehicle, a Proton Iswara Aeroback bearing registration WHA 6071. Notices under s. 25(2) of the Act were duly served by the police on the suspect and Arab Malaysia Finance Berhad, Kuala Lumpur ("the respondent") on 28 May 2001 and 26 June 2001 respectively. Only the respondent made a claim on the motor vehicle to the police, ie, by a letter dated 10 July 2001. On 26 July 2001 the DPP referred the respondent's claim to the Session Court pursuant to s. 32(2) of the Act. The Session Court issued a summon to the respondent to appear before the court on 5 September 2001.

On 5 September 2001 Encik Abdul Halim b. Tasin appeared on behalf of the respondent and DPP Encik Azizul represented the public prosecutor. The matter was postponed to 8 December 2001. However, on 8 December 2001 the matter was further postponed as the Session Court Judge was on emergency leave. On the next hearing date, ie, 6 January 2002 DPP Encik Rahamahtullah appeared but the respondent's representative was absent. Due to their absence, the Session Court judge struck off the application. By a letter dated 27 January 2002 the respondent's lawyer informed the State Legal Adviser that the respondent intended to apply to the Session Court to reinstate their application. DPP Encik Rahamatullah replied by a letter dated 28 January 2002 (date wrongly typed as "28 July 2002") that they had no objection to the respondent's application to reinstate the matter. On 17 February 2002 the respondent filed at the Session Court a notice of application for the reinstatement accompanied with an affidavit in support. The Session Court fixed the date for hearing of the application as 9 March 2002.

On 9 March 2002 Cik Shakiroh appeared on behalf of the respondent but nobody appeared on behalf of the public prosecutor. The respondent's affidavit explained their absence on 6 January 2002 and in para. 10 averred that the DPP had agreed to the application in writing and a copy of the letter dated 28 January 2002 was exhibited. A copy of that letter was in fact sent to and received by the Session Court. The Session Court thereupon reinstated the application, there being no affidavit in reply filed by the DPP. The Session Court adjourned the matter to 16 April 2002 for the examination. The respondent's lawyer sent a letter dated 11 March 2002 to the State Legal Adviser informing about the order of reinstatement by the Session Court and the date of the examination as 16 April 2002. By that letter they also suggested the amount of RM1,500 as consideration for the release of the motor vehicle to them. DPP Rahamathullah by a letter to the respondent's lawyer dated 14 March 2002 replied that they were agreeable to offer of RM1,500 as compensation for the motor vehicle to be released to the respondent.

On 16 April 2002 at the Session Court, DPP Puan Zabidah bt. Ahmad however raised an objection to the examination, stressing that by virtue of s. 278 of the Criminal Procedure Code when the Session Court struck off the application, that decision was final and the Session Court had no further jurisdiction to reinstate the application. The matter, according to her can then only be dealt with by the High Court. The learned DPP cited the case of *Datuk Harun bin Haji Idris v. Officer-In-Charge, Pudu Prison* [1981] 2 MLJ 72 to support her contention. Encik Burhanudeen on behalf of the respondent replied that their application was agreed upon by the DPP earlier and the DPP did not appeal nor ask for revision against the Session Court's order for reinstatement.

The Session Court judge adjourned the matter to 29 April 2002 to hear further arguments on objection raised. The hearing on 29 April 2002 however was adjourned twice on the application of the DPP to 15 May 2002 and 28 May 2002 respectively. On 28 May 2002 DPP Encik Azeezi appeared for the public prosecutor and Encik Burhanudeen appeared for the respondent. Encik Burhanudeen submitted at some length on the matter and at the end, obviously relying on the DPP's letter dated 14 March 2002, prayed for a judgment by consent to be recorded. The DPP informed court that he had nothing to say in reply and in fact also prayed for a consent judgment be recorded. The Session Court thereupon proceeded to make and record a consent judgment for the release of the motor vehicle to the respondent with a condition that the respondent pay to the government a sum of RM1,500 as compensation for the release.

Before going to the substance of the complaint of the DPP, I pause here to make some observation on the final order made by the Session Court on the matter. The duty of the Session Court during the examination under s. 32(2) of the Act was to hear the DPP and the applicant who had made a claim in writing earlier by virtue of s. 32(1)(c) of the Act. If after the examination the Session Court is satisfied that the motor vehicle is not involved with any offence under the Act or the Dangerous Drugs Act 1952 and that it is not an illegal property under the Act, the Session Court can only make one of two orders, namely, either order the release the motor vehicle to the respondent upon the respondent showing proof that they are the lawful owner or in any other case, order the property to be forfeited.

I am unable to find any provision in the Act for any compensation to be paid to the government or any other party when the court order the release of a property under s. 32(2) of the Act. On the requirement under that provision that the court should be satisfied that the motor vehicle was not involved in any offence under the Act or the Dangerous Drugs Act 1952 and that it was not an illegal property under the Act, the Session Court obviously relied on the statement by the DPP regarding that matter in their application for the reference. That was perfectly appropriate as the DPP is legally in charge of prosecution and therefore the proper authority to state those matters.

However, on the requirement that the respondent as the claimant to the motor vehicle proof that they are lawfully entitled thereto, in the record of the Session Court there is only a copy of the respondent's letter to the police dated 10 July 2001 (exhibited by the DPP in the same application). It is highly

questionable whether that copy is sufficient "proof" as required under s. 32(2) of the Act. Apart from the need to show the evidence to the satisfaction of the court, this requirement appears to be quite important as, *inter alia*, in the circumstances of this case at least, the police could have summarily released the motor vehicle to the respondent under s. 31 of the Act without having recourse to s. 32(2) of the Act. Also the term "proof" is conspicuously absent on the earlier requirement of s. 32(2) that I mentioned and in s. 31, unlike the requirement on a claimant to the property in question in s. 32(2) of the Act.

The procedure as adopted by the Session Court thus needs to be improved and tightened in order to comply with the requirement of s. 32(2) of the Act. The respondent should at least be required to file an affidavit deposing on the relevant matters necessary to satisfy the court that they are lawfully entitled to the motor vehicle. The affidavit should exhibit the registration document of the motor vehicle and the hire-purchase agreement. The inspection certificate of the motor vehicle from the jabatan Pengangkutan Jalan should also be exhibited (presumably by the police) to confirm that the chassis number and the registration number of the motor vehicle matched according to their record and has not been tampered with. Otherwise, I fail to see how the Session Court can make a proper decision as required under that provision to release the motor vehicle. However, as mentioned earlier, all these do not form the substance of the complaint of the DPP before me against the order made by the Session Court. So I will leave these matters aside for the time being.

I now turn to the actual complaint of the learned DPP against the order made by the Session Court which forms the subject matter of this application for revision before me. The complaint was solely directed to the Session Court's order on 9 March 2002 to reinstate the respondent's application that was earlier struck off on 6 January 2002. Before this court and indeed before the Session Court below, DPP Puan Zabidah bt. Ahmad argued that the Session Court cannot reinstate the company's application after making an order to strike off the application since it was a criminal and not a civil case; as such s. 278 of the Criminal Procedure Code prohibits the Session Court from doing so. Again as in the lower court, the DPP relied on the decision of *Datuk Harun b. Haji Idris v. Officer-In-Charge, Pudu Prison*. The learned DPP conceded that before the Session Court they did not object to the respondent's application for reinstatement. However, she argued that by not objecting to the respondent's application did not mean that they agreed with application. She further argued that the Session Court should not have regarded the issue of the non-objection by the DPP as meaning that the DPP consented to the application.

This argument by the learned DPP need to be disposed off by me immediately as in my opinion it is fallacious. I am at a loss as to what the learned DPP meant when she said that by not objecting it did not mean that they agreed with the application. This is a classic case of trying to establish a distinction without any difference. It is also not true that they did not agree to reinstatement. The letter from the DPP's office dated 28 January 2002 (date wrongly typed as "28 July 2001") replying to the respondent's lawyer with a copy to the Session Court was quite explicit. Not only was the respondent's application agreed to but it was also agreed that the examination hearing should go on. I reproduce the contents as from the Session Court file:

Ruj. Tuan: BCAS/AMFB/001-0102
Ruj. Kami: PUN(K)J/06/2002
Tarikh: 28 Julai 2002

Tetuan Burhan & Clemons,
Peguambela dan Peguamcara,
No. 1539, 2nd Floor,
Jalan Sultan Badlishah,
05000 Alor Setar,
Kedah Darul Aman.

Tuan,

MAHKAMAH SESYEN DI ALOR SETAR
SAMAN NO: 64-2-2001
TARIKH PERBICARAAN: 6-1-2002
KENDERAAN NO: WHA 6071

Kami merujuk kepada perkara di atas dan surat tuan bertarikh 27/1/2002.

2. Pihak kami tidak mempunyai apa-apa bantahan terhadap permohonan pihak tuan untuk menghidupkan semula (reinstate) tindakan tersebut dan seterusnya tindakan tersebut dibicarakan di Mahkamah.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

(t.t.)

RAHAMATHULLAH BIN BAHARUDEEN
TIMBALAN PENDAKWA RAYA
NEGERI KEDAH DARUL AMAN.

This was further confirmed by the DPP's letter to the respondent's lawyer's letter dated 14 March 2002 agreeing to the respondent's offer of compensation and to record a consent judgment for the release of the motor vehicle which is reproduced as follows:

Ruj. Kami: PUN(K)J/06/2002( )
Tarikh: 14 Mac 2002

Tetuan Burhan & Clemons,
Peguambela dan Peguamcara,
No. 1539, 2nd Floor,
Jalan Sultan Badlishah,
05000 Alor Setar,
Kedah Darul Aman.

Tuan,

DALAM MAHKAMAH SESYEN DI ALOR SETAR
SAMAN NO: 64-2-2001
KENDERAAN NO: WHA 6071

Perkara di atas dan surat Tuan bertarikh 11/3/2002.

2. Saya telah meneliti surat Tuan dan tawaran yang dibuat dan setelah mempertimbangkan, pihak kami bersetuju dengan tawaran sebanyak RM1,500.00 (Satu Ribu Lima Ratus Sahaja) dan sebagai balasannya kereta tersebut dipulangkan kepada pihak tuan.

3. Penghakiman Persetujuan ini akan direkodkan di Mahkamah pada 16/4/2002 sepertimana tarikh yang telah ditetapkan.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

(t.t.)

RAHAMATHULLAH BIN BAHARUDEEN
TIMBALAN PENDAKWA RAYA
NEGERI KEDAH DARUL AMAN

All these give the lie to the learned DPP's contention before me on the issue.

The Session Court, the learned DPP further argued, should have considered or realized that the application before it was a criminal case and not a civil case. Paragraphs (1) and (2) of the headnote under "Held" of the decision of Vincent J in *Tang Kheng Teong & Anor v. PP* [1992] 2 CLJ 1273; [1992] 3 CLJ (Rep) 672 was cited to support her argument that an application under s. 32(2) of the Act is a criminal case or matter. Another authority cited by the learned DPP was the decision of Jeffrey Tan JC (as His Lordship was then) in *Kanagasavey a/l Sinayah v. PP* [1995] 2 MLJ 238. In this case the learned judge cited with approval Vincent J's decision in the earlier case. Section 14 of the Act was also referred to by the learned DPP to show that the argument of the respondent's lawyer that the application under s. 32(2) of the Act was a civil matter was baseless.

It was also argued that it was wrong for the Session Court Judge to strike out the application on the absence of the respondent. The duty of the Session Court then, according to the learned DPP was to proceed to hear the application and make the appropriate decision. The unreported case of *PP v. Cham Yoon Liang & Anor* was cited in support of her argument. The passage of Mohtar b. Abdullah J's (as His Lordship was then) decision in that case that was cited reads as follows:

> Saya berpuashati bahawa perintah pembatalan rujukan adalah salah di sisi undang-undang. Oleh yang demikian perintah Hakim Mahkamah Sesyen untuk membatalkan rujukan ini adalah diketepikan. Rujukan ini adalah dihidupkan semula (reinstated) dan dihantar balik (remitted) kepada Mahkamah Sesyen untuk dibicarakan dalam tempoh 30 hari dari hari ini. Hakim Mahkamah Sesyen hendaklah membuat keputusan mengikut kehendak Seksyen 32(2) Akta ini untuk sama ada melepaskan harta yang disita itu kepada orang-orang yang menuntutnya ataupun melucuthakkan harta itu.

Finally, in support of her arguments, the learned DPP cited the headnote under "Held" para. (3) of the case of Kanasavey a/l Sinayaha which reads as follows:

> ... The language is s. 34 of the Act is both clear and unambiguous in that in proceedings under the Act, the Act must be construed to give effect to its intent. It is explicit that judicial interpretation or any other construction is excluded save as to give effect to the purposes of the Act.

Encik Burhanudeen for the respondent his submission before me listed the issues in this reference as follows:

1. Whether the decision of the Session Court on 6 January 2002 falls within the definition of "judgment" in s. 278 of the Criminal Procedure Code;

2. Whether civil procedure is applicable to an application or matter that is criminal in nature; and

3. Whether the application before the Session Court was a criminal or a civil proceeding.

The abovesaid list is to me an accurate statement of the issues in this reference.

On the first issue, Encik Burhanudeen argued that the actual decision to be made by the Session Court under s. 32(2) of the act was to decide whether the property in question should be released to the claimant or to be forfeited. It is only after the Session Court has made such a decision that a judgment or a final determination relating to the issue before the court is made. As there was no such decision when the Session Court struck off the respondent's application, Encik Burhanudeen submitted that the issues between the parties were then not yet decided upon. Therefore, he argued that s. 278 of the Criminal Procedure Code was not applicable at that stage. There is merit to this argument as can be seen from decided cases, some cited by Encik Burhanudeen on the definition of "judgment" in a criminal proceeding.

The case of *Md. Alwin Mustapa & Ors v. PP* [1999] 5 CLJ 417 from Burnei was cited where Denys Roberts CJ considered s. 240 of the Brunei Criminal Procedure Code which is in *pari materia* with s. 278 of our Criminal Procedure Code. The passage of the judgment relied on (at p. 424) states:

> In *Ratanlalal and Dhirajlal's Code of Criminal Procedure* (1987) 13th edn, at p. 384 the authors observe, in commenting upon s. 362 of Indian CPC which dealt with the alteration of review of a "judgment or final order":
>
> > In order to constitute judgment (in the Code) there must be an investigation of the merits of the case on evidence and after hearing the arguments. Where, however, the order is passed summarily without consideration of the entire evidence as in the case of an order of discharge, it will not obviously amount to a judgment.
>
> I accept this definition of "judgment".

His Lordship in that case referred to the case of *Marzuki b. Mokhtar v. PP* [1981] 2 MLJ 155 in which Thong J adopted the definition of the word "judgment" by Sarkar in *Commentaries on the Code of Criminal Procedure* (1973) as indicating the final order in a trial terminating in the conviction or acquittal of the accused.

The Federal Court case of *Datuk Harun b. Haji Idris v. Officer-In-Charge, Pudu Prison* relied on by the learned DPP is of no assistance to her submission. Although this case is an authority on s. 278 of the Criminal Procedure Code, the issues in that case were totally different from the present case. In that case, the alteration done was not to the actual decisions or judgments made against the appellant but merely rectification to the relevant warrant of committal with the sole purpose of making them conform with the actual decisions on the sentences made by the court. The Federal Court ruled in that case that *functus officio* under s. 278 of the Criminal Procedure Code does not arise as what transpired was an administrative act relating to the drawing up of the proper warrant of committal.

In any event, the definition of "judgment" as applicable to the Criminal Procedure Code is well established and the important element common in all the authorities available is that the order in question must be a final order in the sense that it is final in its effect and the test for determining finality of an order is to see whether the judgment or order finally disposes of the rights of the parties (see: *PP v. Raymond Chia Kim Chwee & Anor v. PP* [1985] 2 MLJ 436 and *Saad b. Abas & Anor v. PP* [1998] 4 CLJ 575). The order of the Session Court in striking out the respondent's application clearly does not have that element to enable it to be construed as a "judgment" within the provisions of the Criminal Procedure Code. That should have effectively disposed off the complaint of the learned DPP. Unfortunately however, that is not the end of the matter. The further issue now is whether the Session Court acted properly in reinstating the application, if the matter was, as presupposed by the learned DPP, a criminal matter or proceeding. This brings me to the second issue.

Assuming for a moment, that the respondent's application before the Session Court was a criminal proceeding, the question is can the Session Court act on its authority as conferred by the Subordinate Court Rules 1980 to reinstate, let alone strike off in the first place, the respondent's application. Encik Burhanudeen cited the case of *Kunn Rekon Holdings Sdn. Bhd. v. PP* [1996] 2 CLJ 689, where Low Hop Bing J made a clear finding, after considering no less than 3 Supreme Court decisions on the matter, that the Rules of the High Court 1980 are operative and apply equally to both civil and criminal proceedings (the cases are *Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hongkong* [1986] 2 MLJ 112, *Gapari bin Kitingan v. Attorney General Malaysia* [1991] 1 CLJ 247; [1991] 1 CLJ (Rep) 129 and *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] CLJ 47).

However, it is to be noted, though it was not argued before me, that the above Supreme Court cases decided on the applicability of the Rules of the High Court 1980 to criminal proceedings in the High Court and not to the subordinate courts. So the question is whether the position is the same in the subordinate courts where the Subordinate Court Rules 1980 apply. The Supreme Court in *Dato' Hashim*'s case decided that the Rules of the High Court 1980 was validly and properly enacted in relation to both civil and criminal proceedings as it was enacted as a subsidiary legislation of its parent Act, the Court of Judicature Act 1964. Section 3 of the parent Act which defines "proceeding" clearly includes "criminal proceedings". Applying the same reasoning would make the Subordinate Court Rules 1980 applicable to criminal proceedings in the subordinate courts. This is because the parent Act of the Subordinate Court Rules 1980, ie, the Subordinate Court Rules Act 1955, provides essentially the same definition of "proceedings" at s. 2.

Therefore, it is my considered opinion that the Session Court was acting properly within its authority, when it struck off the respondent's application and reinstated it, even assuming that the application before itself in this matter was a criminal application. The provision on which the Session Court could have acted on are O. 14 r. 21 and O. 28 r. 5 of the Subordinate Courts Rules 1980.

On the third issue, the two cases cited by the learned DPP are not exactly authorities for the proposition as submitted by her, ie, that a proceeding under s. 32(2) of the Act is a criminal and not a civil proceeding or matter. The two cases, ie, *Tang Kheng Teong & Anor v. PP* and *Kanagasavey a/l Sinayah v. PP* decided on the procedure to be followed in an application under s. 32(2) of the Act. Since there was a lacuna as to what procedure to follow, the procedural requirements of s. 8 of the Act must, according to the two cases, be complied with by the public prosecutor. The issue before us is not the procedure to be followed in such an application but whether the application in question is a criminal or civil proceeding in nature. The learned DPP failed to appreciate this difference. Section 14 cited by the learned DPP therefore is also not directly relevant. Incidentally, the DPPs appearing before the Session Court on this matter did not follow the procedure as laid down in these 2 authorities cited by the learned DPP. According to these authorities the DPP should file the necessary affidavits deposing on the relevant matters as per the application conducted under s. 8 of the Act.

Before going further, it is interesting to note that had the learned DPP taken the trouble to read the judgment cited by her beyond merely citing the headnote, she would undoubtedly come across this passage in Vincent J's judgment in *Tang Kheng Teong & Anor v. PP* (at p. 495) which reads:

> Cases of forfeiture is essentially a civil proceeding but it is conducted by a criminal court for reasons of convenience – as are maintenance proceedings. As such, in an application under s. 8 of the Act the person affected may if he/she so wishes, give notice, as in civil proceedings, to the public prosecutor that he/she desires to cross-examine the deponent(s) of the supporting affidavit(s) (mentioned in s. 8) and the court should allow him/her so to cross-examine.
>
> In the case of *Soong Chee Kong v. PP* which wholly concerns forfeiture of property under s. 106 of the Customs Enactment 1937, the learned judge Taylor J had this to say (at p 7, third paragraph):
>
> > Where a claim is made it must first be considered by the Comptroller who may release the goods but cannot forfeit them. This covers cases of seizure on suspicion where circumstances are afterwards explained to the satisfaction of the Comptroller. It he does not release, he must refer the matter to court.
> >
> > The court 'examines' the matter; this is essentially a civil proceeding but it is conducted by a criminal court for reasons of convenience – as are maintenance proceedings.

So, the authority cited by the learned DPP not only does not support her contention but in fact is an authority against her contention.

The principles determining whether an order is said to be made in a criminal case or matter and not in a civil case or matter are quite well established. In *Ang Gin Lee v. PP* [1991] 1 CLJ 13, the Supreme Court, relying on the House of Lords' case of *Amand v. Home Secretary & Anor* [1943] AC 147, briefly, laid down three important elements; ie, firstly, the order must be a final order, the test is whether it had a final effect of disposing the rights of the parties; secondly, it must involve the consideration of a crime or an offence against the public law; and finally, there must be a charge preferred before some court or judicial tribunal having or claiming to impose punishment for the offence. The matter before the Session Court, ie, the respondent's application under s. 32(2) of the Act, obviously does not have any of the three aforesaid elements. So the submission by the learned DPP on this point is without basis. That being so, I find again that the orders of the Session Court in striking out and subsequently reinstating the respondent application were made within its jurisdiction and authority.

What is left for me on this issue is to deal with the passage of Mohtar b. Abdullah J's decision in *PP v. Cham Yoon Liang & Anor*. In that case, the Session Court struck off the application under s. 32(2) of the Act because the DPP failed to refer to the Session Court under that provision within 14 days after the expiry of three months the property was seized. That decision was appropriate as the duty of the Session Court under that provision is to decide whether to release the property to the claimant or to forfeit it and not as provided in s. 34 of the Act, to be concerned with trivial matters. However, each case depends on its own peculiar facts. In the present case, the application was referred by the DPP to the Session Court within the proper time frame. However, on the day fixed for the examination the respondent who was the claimant was absent. Under the circumstances, as I see from the court's record, there was nothing much that the Session Court could do. As stated earlier, there was no evidence whether from the DPP or the claimant for the Session Court to properly decide on the matter either way. The DPP appearing before the Session Court on 6 January 2002 himself was not helpful. Apart from being present before the court, he had nothing to offer, whether in terms of suggestion or the necessary evidence.

Reading the provision of s. 34 of the Act, which was referred by the learned DPP, it is clear that the main consideration in the construction and interpretation of the Act is to actually give effect to the purpose of the Act and not to objections that are trivial, without merits and that which do not effect the substance or the issue before the court. Looking at the application for revision by the learned DPP before me as a whole, I would regretfully regard the the complaint of the learned DPP as trivial in nature, without merit and do not relate to the substance or the issue before the Session Court below. The whole proceeding there was to consider whether or not to release the motor vehicle to the respondent. At no time before me or at the Session Court below was there any assertion by the learned DPP that the respondent, to whom the motor vehicle was finally released, was not legally entitled to the motor vehicle. It was not part of the learned DPP's complaint before me that the order releasing the motor vehicle by the Session Court was wrong or improper. That order was in fact the whole substance and purpose of the application under s. 32(2) before the Session Court. If to the learned DPP that final order was proper in substance, then going by s. 34 of the Act, all the hassle of this revision would therefore be trivial and should not merit any consideration by this court. After all, the whole purpose the DPP referred the respondent's application was achieved and determined by the Session Court by the time this reference was applied for. The Session Court did ultimately make a decision to the claim of the respondent under s. 32(2) of the Act. That was exactly as what was directed by the learned judge in *Cham Yoon Liang v. PP*.

Before I conclude, the conduct of the learned DPP in the whole episode of this matter before the Session Court need some comment. If the learned DPP was serious in her conviction that the Session Court was *functus officio* after striking off the respondent's application on 6 January 2002, then she should have promptly pursued the matter with due diligence by filing an appeal against that Session Court's order. It was illogical for her to just argue and raise objection before the Session Court which, again according to her argument, was then *functus officio* by virtue of s. 278 Criminal Procedure Code. The Session Court even allowed an adjournment for the parties to further argue on her objections. She did not follow up on it but only applied for this revision before the High Court by a letter dated 17 June 2002, ie, more than three months after the decision of the Session Court that she complained about. By then, the Session Court had ordered the release for the motor vehicle.

There were obvious contradictions between the learned DPP's stance before the Session Court on this matter with all the other DPPs who appeared there at various hearing. As a result at the Session Court the DPPs appeared to be blowing hot and cold. The inevitable inference is that there seems to be a total lack of coordination and proper direction between the DPPs on this matter at the court below. All these, also give rise to an unfortunate impression that the DPP's office is disorganized and haphazard in their conduct. This does not reflect well on the important office of officials dealing and deciding on matters relating to people's liberty and property. I can fully appreciate the dilemma faced by the Session Court in this matter and also the learned counsel for the respondent, who from my observation conducted himself professionally throughout, in not being able to be certain on the stance taken at any one time by the DPP in court despite their written undertakings. I hope that this is a one-off case of misunderstanding and that no such unnecessary episode will occur in the future.

As a postscript to this application for revision, I have to point out that had the learned DPP's complaint been sustained she would be caught by her own argument. If the order of the Session Court is as insisted by her a "judgment" within the meaning of the Criminal Procedure Code, then that order would have been appealable by virtue of s. 307(1) of the Criminal Procedure Code. As such, the appeal period would not only have lapsed long ago; but since the order is appealable, it is precluded from the revisionary jurisdiction of the High

Court unless the learned DPP can show some; exceptional circumstances or some very good reasons. Gopal Sri Ram JCA in *Mohd. Dalhar bin Redzwan v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 at p. 655 states as follows:

> The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged: *Dorai Manickam v. R* [1936] MLJ 261.

In conclusion, the application by the learned DPP to revise the decision of the Session Court in this matter is refused. However, based on the reasons I have given earlier, I hereby order that the order of the Session Court made on 28 May 2002 be set aside and matter be remitted back to the Session Court for the application to be reheard on an urgent basis with the respondent and the DPP if necessary, filing the necessary affidavit in support to enable the Session Court to make a proper order in due course. The sum of RM1,500 is to be returned to the respondent as there is no basis in law for the Session Court to make such an order.